FILED
JAN 29 2011
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NO. 10-583

IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Respectfully Submitted,
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PETITION FOR REHEARING

ISSUE

Whether the courts below erred in relying on *Keith Bowles v. Harry Russell, Warden*, Supreme Court, 551 U.S, 204; 127 S. Ct. 2369 L. Ed 2d96; 2007 and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) as controlling authority that a filing period is jurisdictional under the circumstances of this case.

LIST OF PARTIES IN COURT BELOW

1. Felicia Malveaux Ayanbadejo and John Ayanbadejo, Plaintiffs-Petitioners, *Pro se.*
2. Janet Napolitano, Secretary, Department of Homeland Security, Defendant-Appellees.
3. Sharon A. Hudson, District Director, United States Citizenship and Immigration Services, Defendant-Appellee.
4. United States Citizenship and Immigration Services, Defendant-Appellee.
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TABLE OF AUTHORITY CITED

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8. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) ..i, 1, 2, 3, 5
9. *The United States Of America, And The State Of Texas v. Halliburton Energy Services, Inc., Et Al.*, 2009 U.S. Dist., Lexis,*24; ELR 2040 2009 U.S. Dist. Court ..4
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1. Fed. R. App. P. 4(a)(1)(A) .. 3

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STATUTES

1. 28 U.S.C.S. § 2107(a) .. 3

2. 28 U.S.C.S. § 2107(c) .. 3

Appellants present their petition for rehearing of the above-entitled cause, and, in support of it respectfully show:

GROUNDS FOR REHEARING

A rehearing of the decision in the matter is in the interest of justice because:

1. On January 10, 2011, this court summarily denied the petition for writ of certiorari.

2. The Court gave no grounds for its ruling, which came as a surprise to petitioner.

3. Petitioner was not granted an opportunity to distinguish this case from *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) case or to suggest why they should not be determined by the same rule.

4. This case contains several crucial factual and procedural distinctions from the case of *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) that warrant its determination by a different or at least altered rule.

a. In *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985), the petitioners received a copy of the Court's decision and were mistaken as to the time to file a Notice of Appeal. In instant case there was probative evidence that petitioner John Ayanbadejo never received a copy of the Court's decision within the time limits due to the ineffectiveness of counsel. Mr. Ayanbadejo diligently hired multiple counsel and regularly inquired about the status of the case from one of the attorneys he hired. *See* Appendix "H" and "I" of Petitioners' Appendix filed before this Court.

b. In *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) the attorney-in-charge of the petitioners, where there was one, did not withdraw from the case while the case was pending, without informing the petitioner or filing a formal notice to withdraw notifying petitioner. In instant case attorney-in-charge of petitioners withdrew from the case ***while the case was pending*** without informing petitioner John Ayanbadejo nor did the attorney-in-charge file a formal notice to withdraw notifying petitioner John Ayanbadejo. Mr. Ayanbadejo was induced into believing he had competent attorney-in-charge representing petitioners' interests when the contrary was the case.

It is noteworthy that attorney-in-charge continued to receive notifications from the Court without forwarding the same to Petitioner John Ayanbadejo, even though the attorney-in-charge had Petitioner John Ayanbadejo's full contact information. Petitioner John Ayanbadejo promptly filed Notice of Appeal within 7 days of receipt of Notice of the District Court's decision and the respondents were not prejudiced by the filing.

c. But for the ineffectiveness of counsel, petitioner would have been able to present evidence that would have fundamentally altered the course of the case in lower Court and to timely file his Notice of Appeal. *See* Affidavits recently submitted to respondents reprinted in Appendix "N" and "O" of Petitioners' Supplemental Appendix.

5. The lower courts erred on following the jurisdiction rule promulgated by *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985). After the entry of

final judgment a party has 30 days to file a notice of appeal. Fed. R, App. P. 4(a)(1)(A); 28 U.S.C.S. § 2107(a). 28 U.S.C.S. § 2107(c) and Fed. R. App. P. 4(a)(6) allows district courts in some circumstances to extend upon request the filing period by 14 days or within 7 days after receipt of notice. In *Bowles*, the judge told defendant that he had 17 days to file notice of appeal. Defendant acted on that and filed on the 17th day. The movant can file an appeal with 180 days or 7 days after receipt of the notice of the entry of judgment, and no party would be prejudiced. The rulings of *Bowles* and *Robbins* are that the taking of an appeal within the prescribed time is mandatory and jurisdictional. This can be construed as that certain procedural time lines are mandatory and therefore are jurisdictional. The foregoing is contrary to the law on jurisdiction and tolling in the newer cases, *infra*.

Robbins respectfully, is out of date, out of touch, and does not state the law as it is now held in the 5th Circuit according to the controlling cases, *infra*.

Reed Elsevier, Inc. Et Al, Petitioners v. Irvin Muchinick, Et Al., 120 S.Ct. 1237; 176 L. Ed. 18; 2310 U.S. Stated re *Bowles*:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* (*1278) stands for the proposition that context, including this Court's interpretation of similar provisions in

many years is relevant to whether a statute ranks a requirement as jurisdictional. (p.8)

To the same effect is *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516, 126 S.Ct. 1235, 183 L. Ed. 2d 1097.

In *Padilla v. Kentucky*, No. 08–651, __ U.S. __ (Mar. 31, 2010), this Court recognizing the need for competent counsel, reversed and remanded, holding that criminal defense counsel must inform noncitizen clients whether the plea carries a risk of deportation.

Timothy J. Engel v. 34 East Putnam Ave. Corp., 552 F. supp. 2d 281 (U.S Dist. Ct.U.-2008) held, where a party filed a motion to remand under 28 U.S.C § 2441 (b) filed a motion to remand "notwithstanding *Bowles* (citation omitted) recognizing that *Scarborough* involved a statutory time limit that was not jurisdictional). Statutes of limitations, for example, are generally regarded as defenses and are not jurisdictional. (p. 292). The remand was allowed.

Diaz v. Walter Kelly, Superintendent of Attica Correctional, et al, 515 F3rd 149 (CA 2-N.Y.) at p. 149-150, held that defendant Tan who had language difficulties and there was probative evidence that he had not received a copy of the court's order, and that when he received it he filed it the next day the AEDPA limitation on filing was tolled. The court noted. "it would be an unwarranted extension of *Bowles* to think that the Court was impliedly rendering equitable tolling inequitable to limitations periods just because they are set forth in statutes."

The Fifth Circuit in *The United States Of America, And The State Of Texas v. Halliburton*

Energy Services, Inc., Et Al., 2009 U.S. Dist., Lexis,*24; ELR 2040 2009 U.S... Dist. Court:

Further, the Fifth Circuit has rejected arguments that all statutory time limits are jurisdictional requirements. In *U.S. v. Petty*, the Fifth Circuit stated *Bowles* as limited to "jurisdictional requirements" and thus held that the Antiterrorism and Effective Death Penalty Acts ("AEDPA") one-year limitation period was subject to extension by equitable tolling, 330 F.3d 361, 364& n 5, (5th Cir. 2008). *See Boothe v. Quarterman*, 2008, U.S. Dist. Lexis 31498, 2008 WL 1771919, at *15-*16. (S.D Tex. Apr. 15, 2008) (analyzing *Bowles* and *John R. Sand & Gravel* and noting that most statutes of limitations are non-jurisdictional). Other circuits agree that *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) did not transform every statutory time limit into a jurisdictional requirement. *See Waldron Ramsey v. Pachalke*, 556 F. 3rd 1008, 1011n2 (9th Cir. 2009); *Diaz v. Kelly*, 515 3rd 149, 153-54 (2nd Cir. 2008) both holding that a deadline for motions to dismiss for presumed abuse in the bankruptcy context was subject to waiver because it was not a jurisdictional requirement."

Because the Fifth Circuit Court of Appeals dismissed Appellants' appeal based on *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) the court is in error and this Petition for Rehearing ought to be accepted and considered.

6. A rehearing tightly and squarely focused on the distinctions between this case and *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) case, and whether these distinctions merit a different rule of

law, is a matter of fundamental fairness to petitioner and would not unduly burden the Court. Respectfully, it is a fact of life that a party requires the need for competent counsel; Supreme Court Justices, members of the executive, members of congress, and USCIS agents are not immune from this need as can be gleaned from current affairs. Protecting the need for competent counsel is a matter of fundamental fairness.

CONCLUSION

For the foregoing reasons, John Ayanbadejo urges that this petition for a rehearing be granted, and that, on further consideration the Petition for Certiorari be granted and/or the judgment of the lower court be reversed.

Dated: January 29, 2011

Respectfully Submitted,
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By: _____
John Ayanbadejo

PRO SE

CERTIFICATE OF GOOD FAITH

I, John Ayanbadejo, *Pro Se* Petitioner, certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

By: _____
John Ayanbadejo

PRO SE

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

As required by Supreme Court Rule 33.1(h), I certify that the document contains approximately 1435 or less than 3000 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 29, 2011

By: _____
John Ayanbadejo

PRO SE

SUBSCRIBED AND SWORN TO BEFORE ME on January 29, 2011 at Houston, Texas, as attested to by my seal and signature as set out below.

Signature _____

Name Hatim J. Amiji

Notary Public in and for the State of Texas

My Commission expires:
Date 04-03-2012